

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SILVANA GIANELLO,

vs.

ERIC HOLDER, JR.,

Petitioner,

Respondent.

CASE NO. 11CV0180-LAB (JMA)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

Petitioner Silvana Gianello, a prisoner in federal custody, proceeding *pro se*, filed her petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The Court ordered Respondent to show cause why the petition should not be granted, and the petition is now fully briefed.

Gianello is a Uruguayan national. In August of 2007, she entered the United States without inspection, and remained here for seven months. On May 29, 2008, she attempted to enter the United States from Mexico by presenting false documents. She was placed in removal proceedings, and on July 16, 2008, she was removed to Uruguay. At the time, she did not mention any fear of returning there. Then on April 1, 2009, she again attempted to enter the United States in the same way. After she was placed in expedited removal proceedings, she made an asylum claim. Her claim was denied and a stay of removal was also denied. The Department of Homeland Security (DHS) determined that she was a flight risk, and held her in custody pending removal.

1 **Gianello's Claims**

2 Gianello's petition requests a stay of removal, relief from the removal order, and
3 release from custody on parole. In his return to the petition, Respondent argues that the only
4 live claim is her request that the Court review DHS's denial of parole, and that the others
5 were all rendered moot or unripe when the Ninth Circuit remanded her petition to the BIA for
6 review, and granted a stay of removal pending the BIA's decision. Respondent argues that
7 the REAL ID Act precludes the Court from reviewing the denial of parole, and that even if
8 review were authorized, Gianello fails to raise an adequate challenge and the denial was
9 legitimate and adequately supported.

10 In her traverse, Gianello admits her claims were remanded to the BIA, and argues
11 only that she should be released on parole. (See, e.g., Traverse (Docket no. 11) at 8¹
12 (asking the Court to review DHS's denial of parole, and voicing complaints about DHS
13 officials' handling of that decision)). While it is not very clearly written or organized, it
14 appears to focus solely on the hearing at which she was denied parole and the DHS officials
15 involved, and raises numerous complaints about the proceedings and outcome.² It attaches
16 numerous documents pertaining to Gianello's detention and asylum claims, but merely
17 attaching documents is not the same as raising claims or making arguments.³ And it does
18 not address Respondent's argument concerning mootness or unripeness of other claims.

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20 ¹ The Traverse is not consecutively paginated. It begins with an 8-page introductory
21 document outlining Gianello's arguments, followed by two pages of exhibits, followed by
22 twelve more pages in which the page numbering restarts at 1. This is followed by an index,
23 purportedly identifying thirteen attached exhibits, some of which are unnumbered and some
24 of which have their own pagination that is not consecutive with the Traverse's. For clarity and
25 convenience, this order will cite to the page numbers generated by the Court's CM/ECF
26 system.

27 ² These are the only claims brought by Gianello that the traverse discusses. It also
28 spends a good deal of time focusing on issues not implicated here, such as the
appropriateness of a stay of removal (Traverse at 7), improper denial of her asylum request
(*Id.* at 11), and the standards for class certification. (*Id.* at 19–21.)

³ It is common for *pro se* litigants to attach all documents they think might be relevant
in some way. Doing so isn't a sufficient way to raise all potential issues or claims that might
arise out of or be related to those documents, though, because that would require the Court
to overstep its role as neutral arbiter. "The courts cannot assume the role of advocates and
create arguments never made." *Donahue v. United States*, 660 F.3d 523, 524 (1st Cir. 2011).
See also *Jacobson v. Filler*, 790 F.2d 1362, 1364–66 (9th Cir. 1986)).

1 Gianello later supplemented the Traverse, but the supplementary materials don't address
 2 these issues either. If later events rendered Gianello's claims ripe or non-moot in some way,
 3 she has not brought this to the Court's attention.

4 The party invoking the jurisdiction of the federal court bears the burden of establishing
 5 that the court has subject matter jurisdiction to grant the relief requested. *Kokkonen v.*
 6 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Because Respondent raised the
 7 jurisdictional issues of unripeness and mootness, and Gianello didn't rebut this argument in
 8 any way, the Court accepts that the only live claim the petition raises is whether she is
 9 entitled to parole pending deportation.

10 Discussion

11 Under 8 U.S.C. § 1225(b)(1)(B)(ii), DHS has authority to detain arriving aliens, which
 12 here includes Gianello. Under 8 U.S.C. § 1182(d)(5)(A), DHS has discretionary authority to
 13 grant parole to asylum applicants, and this includes arriving aliens. *See Ortega-Cervantes*
 14 *v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007). Discretionary decisions are, generally
 15 speaking, beyond the scope of habeas review. *See Singh v. Holder*, 638 F.3d 1196, 1202
 16 (9th Cir. 2011) (citing 8 U.S.C. § 1226(e)). But the Court does have jurisdiction to entertain
 17 claims that denial of parole was unconstitutional (because of due process violations, for
 18 example) or violated some federal statute. *Id.* In other words, the question before the Court
 19 is not whether the Court agrees with the denial of parole or would have made the same
 20 decision itself, but whether the denial was unconstitutional or otherwise illegal.

21 Importantly, denial of parole and denial of bond to Gianello are separate matters.⁴
 22 The government's return correctly points out that the petition only attempts to appeal the
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24 ⁴ Initially, the DHS's parole denial noted that an "alternative to detention" program
 25 was available, and thus no bond was needed. (Return, Ex. at 52.) She later made a request
 26 for review of DHS's bond denial, but the immigration judge denied this, noting that he had
 27 no authority to conduct such a review. (Return, Ex. 71, 74–75 (memorandum, citing 8 C.F.R.
 28 § 1003.19(h)(2)(i)(B)).) The Bureau of Immigration Appeals, however, did consider her bond
 request, distinguished *Casas-Castrillon* on the basis that it did not apply to arriving aliens
 such as Gianello, and denied the appeal. (Return, Ex. 86–87.) While the basis for this
 decision is questionable, see *Centeno-Ortiz v. Culley*, 2012 WL 170123 (S.D.Cal., Jan. 19,
 2012) (rejecting government's argument that *Casas-Castrillon* does not apply to arriving
 aliens), Gianello has not appealed this decision.

1 former, not the latter. (Return at 5:21, 7 n.4; Pet. at 4.) Even after having this pointed out
2 to her, Gianello expressed no disagreement with the government's characterization of the
3 petition. She argues that denial of parole was an abuse of discretion (Traverse at 4, 8, 12),
4 and that several non-adjudicative officers properly conducted their investigations made in
5 connection with her parole and asylum claims.⁵ Consequently, this order does not consider
6 whether bond should have been denied, nor whether Gianello might be able to file a
7 successive petition arising from her continued detention.

8 The government points out that because determinations of flight risk involve the
9 weighing of factors and are discretionary, they are beyond the scope of ordinary habeas
10 review. See *Singh*, 351 F.3d at 439. And even if Gianello could articulate a due process
11 challenge, the government argues, immigration officials need only rely on a "facially
12 legitimate and bona fide reason" for denying parole. See *Nadarajah v. Gonzales*, 443 F.3d
13 1069, 1082 (9th Cir. 2006). If officials do advance such a reason, "the denial of parole is
14 essentially unreviewable." *Id.*

15 The government argues this standard was met by evidence showing that Gianello
16 has no fixed address, family ties, or employment history in the United States; that she had
17 entered without inspection; that in 2008 and 2009 she presented fraudulent documents to
18 DHS officials in an effort to slip into the United States; and that in a sworn statement given
19 April 1, 2009, she concealed the fact of her 2007 arrest and domestic violence conviction of
20 an infraction under Cal. Penal Code § 415.

21 This is nearly, but not quite correct. The DHS's initial denial (Return, Ex. at 50–52)
22 was based on findings that Gianello lacked substantial community ties, and that she was a
23 flight risk (though not a danger to the community.) This was supported by findings that the
24 officer tried numerous times to contact her sponsor but could not do so, that Gianello posed
25 as a different person and gave false documents in an effort to enter the country, and that her
26 "story had a lot of [inconsistencies] and [she] continued to be deceitful even after advised

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28 ⁵ These include deportation officer Hernandez, whose report was used in making the
parole decision. (See Return at 52; Traverse at 3–5), and immigration officers Leyva and
Abend, who reviewed a report later submitted to the BIA. (Traverse at 8; Return at 84.)

1 to tell the truth.” (*Id.*) The officer did not rely on Gianello’s concealment of her arrest, and in
 2 fact, the record shows Gianello did disclose her arrest for domestic violence.⁶ These are the
 3 types of factors immigration authorities properly look to when determining whether a subject
 4 is a flight risk, see *Singh v. Holder*, 638 F.3d 1196, 1206 and n.5 (9th Cir. 2011) (citing *Matter*
 5 *of Guerra*, 24 I & N. Dec. 37, 40 (B.I.A.. 2006)), and here they are powerful.

6 Here, DHS officials advanced multiple legitimate and bona fide reasons, which are
 7 consistent with the record, for determining that Gianello was a flight risk and for denying
 8 parole. Six of the nine *Guerra* factors—her lack of a fixed address in the United States, her
 9 non-residency in the United States, her lack of family ties in the United States, her lack of
 10 employment in the United States, her history of immigration violations, and her manner of
 11 entry into the United States—all tend to show she is a flight risk. The other factors all either
 12 appear to be inapplicable, neutral, or otherwise unhelpful to her.

13 Gianello cites *Akinmade v. I.N.S.*, 196 F.3d 951 (9th Cir. 1999) in support of her
 14 argument that use of false documents or lies made to immigration cannot be held against
 15 her, but this is an inapt citation. *Akinmade* did not deal with flight risk, but rather with an
 16 adverse credibility determination in an asylum determination, made on the basis of an
 17 applicant’s use of a false passport and false declarations. *Id.* at 955. That opinion pointed
 18 out that false statements about nationality, by themselves, are not reason to doubt an
 19 asylum-seeker’s credibility, because “a genuine refugee escaping persecution may lie about
 20 his citizenship to immigration officials in order to flee his place of persecution or secure entry
 21 into the United States.” *Id. Compare Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 911 (9th Cir.
 22 2004) (citing *Akinmade*) (“[T]he use of a fraudulent document may, considering the totality
 23 of the record, lend support to an adverse credibility finding”)

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 25 ⁶ It may be that the government assumed this was one of the inconsistencies or
 26 omissions. But in fact, the record is replete with examples of her inconsistent or incomplete
 27 statements. For example, she stated under oath that she had lived in Los Angeles for about
 28 7 years. (Return, Ex. 21.) The immigration judge, however, was told that the longest she had
 remained in the United States was for seven months, in 2007 and 2008. (*Id.*, 61.) The
 immigration judge found that her two children live in Uruguay. (*Id.*, 60.) But she told
 immigration officers she had a daughter living in Reseda, California (*Id.*, 82) In her traverse,
 and the documentation supporting it, she represents that she has children and grandchildren
 living in Los Angeles. (Traverse at 12; Traverse Exhibits at 7, 56 (letters of support).)

1 But when determining whether a person is a flight risk, that person's past immigration
2 violations, manner of entry into the United States, and attempts to evade authorities are all
3 *Guerra* factors, and as such are properly considered. Gianello's history of immigration
4 violations is well documented and very unfavorable. (See Return, Ex. 61 (describing
5 Gianello's 2007 and 2008 illegal entries).) Furthermore, her statements under oath to
6 immigration authorities are both materially inconsistent and implausible. As an example, on
7 April 1, 2009, the day of her latest apprehension, she claimed she didn't know it was illegal
8 for her to use a fake entry card to get into the United States.

9 Q: I now present to you this document (DSP-150 Card MXT000036184). Did
10 you present this document in an attempt to gain admission into the United
11 States?

12 A: Yes.

13 Q: At the time that you presented this document to the inspecting officer,
14 were you aware that this document is not a legal document for you to use?

15 A: No.

16 Q: Is the picture in the DSP-150 card your true identity?

17 A: No.

18 Q: Is the date of birth in the DSP-150 your true DOB?

19 A: No.

20 Q: How much did you pay or would you pay for this document?

21 A: I was going to pay 500.00 U.S. dollars.

22 Q: Do you know the person that sold you the document?

23 A: No.

24 Q. Did you know it was against the laws of the United States Immigration and
25 Nationality Act to attempt to enter in the manner that you did, knowing you
26 have no legal documents to enter or reside in the United States?

27 A: No.

28 (Return, Ex. 20–21.) She later testified that she had not bought the fake card and never tried
to use it, claiming she had attempted to slip past the pedestrian checkpoint and elude the
officer without presenting the card. (*Id.*, Ex. 61–62 (Immigration Judge's Decision).)

The traverse claims investigators called her sponsor (who she says was her boyfriend
or fiancé) in an effort to confirm her story that she would have a place to live in the U.S., but
that they called him at the wrong times, were rude to her, and wouldn't listen to her
explanations why he wasn't answering. (Traverse at 3.) She attaches documentation from

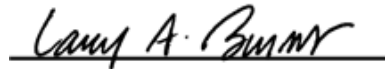
1 him showing he has offered to support her for several months and provide her a place to
2 stay. (Traverse Exhibits (Docket no. 11-1), at 2-7). But even if she had presented evidence
3 that their investigation was not as effective or polite as she thinks it should have been, it
4 doesn't render the government's decision illegitimate or invalid.

5 **Conclusion and Order**

6 In short it is clear that the denial of parole was supported by facially legitimate and
7 bona fide reasons, and did not amount to an abuse of discretion or violation of due process.
8 The petition is **DENIED** and a certificate of appealability is also **DENIED**.

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10 **IT IS SO ORDERED.**

11 DATED: March 23, 2014

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13 **HONORABLE LARRY ALAN BURNS**
14 United States District Judge
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